UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

Doc# 162-1

In Re:
Laura Ann Stoltz,
Debtor.

Chapter 7
Case No. 97-11879

MEMORANDUM OF DECISION
GRANTING MOTION FOR RELIEF FROM STAY

I. ISSUE

Brattleboro Housing Authority ("BHA") has filed a Motion for Relief from the Automatic Stay (the "Motion"), to enforce its rights and remedies under a lease (the "Lease") with Laura Ann Stoltz (the "Debtor") and her co-tenant, Shane Farrell, for a public housing unit located in Brattleboro, Vermont (the "Premises").[1] BHA alleges post-petition payment defaults under the Lease, entitling it to relief from stay to commence eviction proceedings against the Debtor (and co-tenant).[2] In opposition, the Debtor contends that there are no "post-petition" defaults and, therefore, BHA is not entitled to lift stay relief. The Debtor argues, first, that the conversion of her case from chapter 13 to chapter 7 transformed any post-petition, pre-conversion lease default debts to pre-petition claims; and second, that granting relief to BHA to evict her would violate §525(a) of the Bankruptcy Code, which protects a debtor against discriminatory treatment by a governmental unit.

This motion raises the issue of whether tenants who have leases with government agencies are protected from eviction by the provisions of 11 U.S.C. §525. This Court finds that §525 does not prohibit

[1] For ease of discussion, the Debtor will be referred to alone when discussing the tenants under the Lease.

[2] There is no dispute that the only remedy BHA seeks is to evict the Debtor; both parties acknowledge the discharge of the Debtor's liability for unpaid rent.

eviction of a debtor who is in default under the terms of a lease and therefore, grants BHA's motion for relief from the automatic stay.

II. JURISDICTION

This Court has jurisdiction over this motion under §§157, 1334 and 1411 of Title 28, U.S.C.

III. BACKGROUND

The relevant facts are simple and undisputed. BHA is a governmental entity that operates the public housing complex where the Debtor resides. BHA and the Debtor entered a month-to-month Lease for the Premises, dated August 1, 1996. The Debtor defaulted on her payments under the Lease and BHA commenced an action to recover the arrears and evict the Debtor. Judgment for arrears and eviction was entered in favor of BHA on December 23, 1997 and the Debtor filed a chapter 13 petition on December 26, 1997. The bankruptcy filing stayed any further proceedings in connection with the eviction proceeding [11 U.S.C. §362(a)].

The Debtor sought to confirm a chapter 13 plan and assumed the Lease. BHA opposed confirmation of the plan and the assumption of the Lease, and also filed a motion for relief from the automatic stay. By Memorandum of Decision dated May 13, 1998 and related Order dated June 3, 1998, the Court (Conrad, J.) denied both confirmation of the chapter 13 plan and assumption of the Lease, and granted relief from stay to BHA. By Order dated October 1, 1998, the United States District Court for the District of Vermont (Murtha, C.J.) reversed Judge Conrad's decision with respect to the Debtor's standing to assume the Lease and remanded the case to Bankruptcy Court. See In re Stoltz, 233 B.R. 280 (D. Vt. 1998).

BHA appealed Judge Murtha's decision. In its November 29, 1999 decision, the Court of Appeals affirmed the District Court's reversal to the extent that the Bankruptcy Court denied the motion

to assume the Lease based on the ground that the Lease had expired prior to the date the chapter 13 petition was filed; and remanded the case to Bankruptcy Court for a determination of whether the Debtor's motion to assume the Lease should be denied on other grounds. In Re Stoltz, 197 F.3d 625 at 631 (2nd Cir. 1999) at 628. The Appellate Court specifically found that on the facts of this case, it was unnecessary to decide whether a public housing tenant, who is a debtor, is entitled to greater protection from eviction pursuant to §525(a) of the Bankruptcy Code. Id. at 631 at footnote number eight.

During the pendency of the appeal, the Debtor made post-petition rent payments and remained current for almost two years after her case was filed, but then fell into default in October, 1999. BHA filed the Motion for Relief from Stay on January 20, 2000 based upon the four missed post-petition rent payments. On February 7, 2000, prior to any hearing on the stay relief motion, the Debtor moved to convert her case to chapter 7. The Court (Littlefield, J.) entered an Order converting the case to chapter 7 on February 11, 2000. There is no allegation that the Debtor has failed to make any payments due to BHA since the February, 2000 Order converting her case to chapter 7. The conversion of the case to chapter 7 mooted the remand from the Second Circuit on the lease assumption question and leaves only BHA's §362 motion and the Debtor's §525 defense before this Court.

IV. DISCUSSION

BHA urges the Court to modify the automatic stay of 11 U.S.C. §362 to permit BHA to proceed with an eviction proceeding against the Debtor for nonpayment of rent. The Debtor, however, argues that the conversion of her case from chapter 13 to chapter 7 transformed her post-petition defaults to pre-petition claims by virtue of §348 and that any attempt to evict the Debtor would *de facto* be based on a pre-petition rent default which is dischargeable in bankruptcy and hence would violate §525(a). It is the Debtor's contention that §525 prohibits any action by governmental units against a Debtor that is premised on a default which was discharged in a bankruptcy case. Essentially, the Debtor argues that she is entitled

to both discharge her personal liability for the pre-petition rent debt, and to enjoy all her rights under the Lease, notwithstanding her default.

1. Impact of Conversion Under 11 U.S.C. §348

There is no question that the Debtor's conversion of her case to one under chapter 7 converted her post-petition rent obligation to an unsecured pre-petition claim.[3] Since pre-petition claims are dischargeable, and post-petition claims are not, this distinction is very important. See 11 U.S.C. § 727(b). This Court finds that by operation of law, pursuant to §348(d), all rent the Debtor owed to BHA, through the date of conversion, is pre-petition rent.[4]

2. The **Couture** Case

The question of whether this is a pre-petition claim or a post-petition obligation takes on special significance here because of the ruling, relied upon by both parties, of In re Couture, 225 B.R. 58 (D.Vt. 1998). In that decision, Judge Sessions ruled first that, as a general rule, a landlord may proceed against a debtor tenant for non-payment of rent only for an *in rem* remedy:

> 'It is crystal clear . . . that a discharge only prevents a creditor from proceeding against the debtor on the debt as a personal liability.' In re Rush, 9 B.R. 197, 200 (Bankr. E.D. Pa. 1981). Since the failure to pay rent is a breach of the lease, the landlord may pursue any

[3] §348(d) provides: A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under §§1112, 1208, 1307 of this title, other than a claim specified in § 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

[4] BHA filed a motion on May 30, 2000, requesting that the Court set the effective date of the conversion as December 23, 1997 or October 1, 1999, in order to avoid the issue now before the Court. However, the Court did not find adequate cause in this case to modify the provisions of §348 and therefore denied the motion. Hence, the plain language of §348(d) applies and this must be deemed a pre-petition rent claim.

> remedy to which it is entitled under state law for that breach except a remedy against the debtor personally to collect the money due. The landlord may still proceed *in rem* against the leased premises. In re Bacon, 212 B.R. at 69.

Id. at 64. However, Judge Sessions went on to find that if the landlord is a governmental unit then there is no right to evict the Debtor/Tenant unless there is a post-petition default under the lease:

> Whether [the landlord] proceeded in state court to press the [debtors'] eviction before or after the discharge of the debt, such an eviction proceeding would clearly be prohibited by §525 of the Bankruptcy Code. In re Szymecki, 87 B.R. 14 (Bankr.W.D. Pa. 1988) . . . The rights of the landlord to proceed in state court are limited. The landlord's action must be based **wholly** on the debtor's default on post-petition rent payments. In re Gibbs v. Housing Authority of New Haven, 76 B.R. 257, 262 (D.Conn.1983) *[emphasis original]*

Id. at 65. Having found that the rent default here constitutes a pre-petition claim, the question is whether this Court reads §525, as the Couture Court did, to prohibit BHA from evicting the Debtor.

The facts in Couture were identical to the facts at bar, with one critical distinction: the Coutures filed their case in chapter 7, whereas the Debtor here filed a chapter 13 and later converted her case to chapter 7. Although there is no question that the Debtor has the right to convert her case to chapter 7 [11 U.S.C. § 1307(a)], and hence to transform her post-petition default into a pre-petition default, it is not clear that the Couture court considered the possibility of stretching §525's protections to this situation. Under Couture if Debtors file chapter 7 at a time when they owe rent, *and if their landlord is a governmental unit*, they are entitled to a fresh start with the landlord and to retain possession of the unit, provided they make all rent payments required under the Lease which become due after the filing of the petition (i.e., the post-petition payments).

The question squarely before this Court is whether the Debtor can defeat the lift stay motion, relying solely on the alleged protections of §525(a), when she has no defense under §362. This Court finds that the better reasoned cases hold that §525(a) does not require government landlords to reinstate leases that are in default or authorize courts to allow Debtors greater rights under a lease, after they default, solely

because the landlord is a governmental entity. To rule otherwise would, in this Court's opinion, invite abuse of the bankruptcy process by debtor tenants and penalize the very entities that are trying to assist individuals in need of low income housing. In fact, it would create a reverse discrimination situation where governmental landlords would be required to give tenants who file for bankruptcy relief special privileges not available to non-debtor tenants.

3. Scope of Protection Provided to Debtor/Tenants by 11 U.S.C. §525

Section 525(a) protects a debtor against discriminatory treatment. It states in relevant part that:

> a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

In Couture, the District Court recognized that but for its interpretation of §525(a), relief from stay would certainly be granted to the housing authority to enforce its state law rights to the leased premises, based upon the rent payment default. Couture, 225 B.R. at 64-5. It was not disputed that the pre-petition rent would be discharged; the landlord was seeking repossession of the premises only and not a judgment on the debt. Id. The landlord takes the same position here: it seeks to evict the debtor based on her non-payment of rent. Neither party in the instant case disputes that the landlord would be entitled to relief from stay if the landlord were not a governmental unit.

I believe it is clear that §525 is directed not just at creditors who happen to be governmental units but at governmental units in general, and that its purpose is to eliminate the potential for discrimination based

upon bankruptcy filing in those areas where the government is essentially the sole provider of an important service.

> Thus, the issue in §525(a) is not collection of discharged debt, ably dealt with in other sections, but refusal to deal with the debtor because of his bankruptcy and its consequences. While there is no proscription on a private party's refusal to deal, there is such a prohibition when the party is a governmental entity and the dealings are in the nature of licenses, permits, charters, franchises or similar grants for due to the exclusivity of those benefits, their absence will impair the debtor's fresh start.

In re Bacon, 212 B.R. 66, 74 (E.D. Pa. 1997).

Some Courts have held that §525(a), dealing with anti-discrimination, supercedes the language of §365, dealing with assumption and rejection of leases, when the issue is a default under a government held lease. See In re Szymecki, 87 B.R. 14 (W.D.Pa. 1988), In re Sudler, 71 B.R. 780 (Bankr.E.D.Pa., 1987). I find no merit in that argument; I am persuaded by the excellent analysis set forth in In re Bacon, supra, to the contrary. The more specific language of §365(d)(1) must be read to trump the general provisions of §525(a). See In re James, 198 B.R. 885 (Bankr. W.D. Pa., 1996). The proposition that a logical extension in chapter 13 is to read §525 (a) to override §365 is without support in the Code, legislative history or principles of statutory interpretation. Bacon, 212 B.R. at 72.

Subsequent to the hearing in the instant case, the District Court entered a decision which I find to be as relevant as Couture to the question at hand. In Merchants Bank v. Frazer, No. 99-CV-326 at 4 (D.Vt. August 8, 2000), this District addressed a statutory construction issue analogous to the one presented here. In Frazer, the District Court was asked whether the specific and short time period set forth in §108(b) supercedes the more general stay provisions of §362. As here, neither the legislative history nor the statutes themselves directly defined the relationship between the two provisions of the Bankruptcy Code, yet arguably either could apply to the issue presented. The District Court found that since §362(a) specifically fails to mention the running of time periods whereas §108(b) explicitly specifies timing issues,

§108(b) trumps §362 in the realm of timing, and quoted the conclusion of the Sixth Circuit that " where one section of the Bankruptcy Code explicitly covers an issue, another section should not be interpreted to cause an irreconcilable difference." Id. at 6, citing Bank of Commonwealth v. Bevan, 13 B.R. 989 (E.D.Mich.1981). This holding can be applied directly to the instant case.

In the instant case, §§525(a) and 365 are only in conflict with each other if one reads §525(a) expansively. See In Re Bacon, 212 B.R. at 74, note 16. The protection against discriminatory treatment articulated in §525(a) is very general; it does not provide any explicit exceptions to other sections of the Bankruptcy Code or state that it overrides other sections of the Bankruptcy Code. By contrast, §365 does set forth specific obligations for assumption of a lease that is in default and includes detailed requirements for several different types of leases. It is especially noteworthy, particularly in light of Frazer, that §525 does not mention leases, lessors or creditors, whereas §365 specifically addresses leases and does not exclude governmental lessors[5]. Therefore, any reading that holds §525 to override §365 when construing government leases would create an irreconcilable difference between these two provisions, as well as being inconsistent with Frazer, supra. This Court is bound to construe the two provisions in a fashion that avoids conflict in meaning, if that is possible. It is possible to reconcile these two sections by holding that it is not

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[5] As noted in Frazer,
"While sec 362(a) broadly protects debtors in general terms, sec108(b) is narrow in its scope. It applies specifically to those debtors who, prior to filing for bankruptcy, entered into agreements which created a limited time period within which they must make some affirmative act, but filed for bankruptcy prior to the expiration of that time period. Therefore, while all debtors are generally protected under the indefinite stay of sec 362(a), that protection is limited for those who had pre-existing agreements to pay by a particular date under sec. 108(b)." Id. at 11. In this case the same language could be used to explain why §525(a) cannot trump §365 or prohibit enforcement of §362, i.e., §525(a) broadly protects debtors in general terms, §365 is narrow in its scope; §365 applies specifically to debtors who, prior to filing for bankruptcy, entered into agreements which created leases.

discriminatory under §525(a) to require one who assumes a lease to cure all pre-petition defaults as a precondition to assumption, as required by §365. See In re James, 198 B.R. 885 (Bkrtcy.W.D.Pa. 1996). By corollary, it is not discriminatory under sec §525(a) to grant relief from stay to a landlord who would be entitled to lift stay relief under §362 if it were not a governmental entity. See Bacon, 212 B.R. at 74.

I rely upon the rationale of the Bacon court because its construction of §525 is more than merely semantical; it makes good sense from a public policy perspective as well. Under its

construction, the Debtor has no specific interest in her leasehold and the landlord does not forfeit its remedies. Id. at 75, note 17. Bacon distinguished between the housing authority's interest as a creditor and its role as a grantor of a public benefit, enabling the public landlord, as a creditor, to receive the same rights under the Bankruptcy Code as other creditors in the private market. Id. at 75. As the relationship between debtors and creditors in general is not implicated by §525(a), the relationship between debtors and government creditors should not be impacted by §525(a), unless the public creditor deprives the debtor of a protected grant. Under this approach, the debtor tenants in the public housing market are responsible for the same contractual obligations as non-debtor tenants in the public housing market. The impact of §525(a) in this context is to ensure that a former or current debtor is not discriminated against, for example, in the application process. As stated in Bacon, "[e]viction from the [specific] leasehold does not . . . [violate §525(a)] since the Debtor is eligible to reapply for housing." Id. at p. 75, note 17. This interpretation of §525(a) maintains the balance between protecting the debtor from governmental discrimination based solely on one's identity as a debtor, and protects the creditor interests of a creditor which happens to be a governmental unit. This balance lies at the heart of the Bankruptcy Code.

Bacon referred approvingly to In re Lutz, 82 B.R. 699 (Bankr. M.D.Pa.1988), where the court addressed the importance of maintaining this distinction between the government as landlord or creditor, and the government as a source of discrimination:

> [§525] does not cure contractual defaults and does not require governmental units to continue a contractual relationship with a debtor when, pursuant to the terms of that contract, the pre-petition default constitutes cause for terminating the contractual relationship. Unless it is shown that the creditor was attempting to collect a pre-petition debt, or was otherwise discriminating against the debtor, a governmental unit's termination of a lease based on a pre-petition default is not *per se* a violation of §525.

Lutz, 82 B.R. at 705. As stated above, the Debtor herein has not alleged any claim that BHA is seeking to impose personal liability on her, but rather alleges that §525(a) is an absolute defense to eviction.

Under today's holding, a debtor/tenant can be evicted from public housing if he or she is in default under the Lease, as long as he or she is not denied the right to reapply, on a space available basis, for comparable housing without regard to the fact that he or she has sought bankruptcy relief, without violating §525. In this regard, Bacon noted:

> I recognize the result of this rule may be the temporary loss of a public housing unit for the Debtor as she awaits the assignment of a new unit. The hardship of this consequence will be a function of the demand for housing and the availability of units. However, as the Court noted in Watts, [876 F. 2d 1090 (3d Cir. 1989)] 'the fresh start policy does not require the State to insulate a debtor from any and all adverse consequences of a bankruptcy filing.'

Id. at 76 (citation omitted).[6] The Hobbs court echoed this sentiment and set forth its rationale persuasively:

> If §525(a) is read as broadly as Debtor argues, a public housing authority could never evict a tenant. Every time a tenant defaulted under a lease, a tenant could simply file for bankruptcy and discharge the pre-petition debt. The tenant then could invoke the protection of §525(a) to maintain possession of the premises without curing the pre-petition defaults under §365(b)(1)(A). This Court rejects this interpretation of §525(a)

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[6] It is important to note that the Third Circuit decided Watts, construing § 525(a) narrowly, after the Bankruptcy Courts of that Circuit decided Sudler and Szymecki, discussed above.

> while recognizing that the effect on this particular Debtor is harsh. The Debtor has limited financial means and will be dispossessed of her subsidized housing. However, §525(a) was not intended to shield debtors from their responsibilities under a residential lease. The Debtor can reapply for subsidized housing. The waiting period before the Debtor can reacquire subsidized housing will depend on the number of available units and the number of people demanding such accommodations. If the Creditor refuses to grant the Debtor subsidized housing because the Debtor filed this bankruptcy case and discharged pre-petition rent, then and only then would §525(a) prohibit the Creditor's actions. However, §525(a) does not prevent the Creditor from proceeding with the requested eviction.

Hobbs, 221 B.R. at 896.

I find the analyses in Bacon and Hobbs compelling. The distinction between the grant to participate in the public housing program, and the absolute right to remain in a particular unit even if no rent is paid, is critical. The congressional history[7] and the balance of rights in the Bankruptcy Code requires that this distinction be recognized and that the scope of §525(a) be limited to the general grant of freedom from discrimination. Any other reading of §525(a) would make it simply another manifestation of the automatic stay and render §365 meaningless as to landlords which are governmental units. In that regard, this Court, like the Bacon court, agrees with the conclusion reached in In re Saunders, 105 B.R. 781 (Bankr. E.D.Pa.1989):

> §525(a) instead was intended to reach non-creditor governmental (or quasi-governmental) entities that, in their quest to protect the public interest, wrongfully discriminate against debtors and frustrate the "fresh start" policy of the Bankruptcy Code by denying property interests not obtainable through the private sector. Unless the governmental entity was acting as an agent for a creditor, such conduct would not run afoul of §362.

Saunders, 105 B.R. at 787 (internal citations omitted).

V. CONCLUSION

The Bankruptcy Code is designed to give the honest debtor a fresh start, and §525(a) helps to

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[7] See H.R.Rep.No. 595, 95th Cong., 1st Sess. Pp. 366-67, 1977 U.S. Code Cong. & Admin. News pp. 5963, 6321-6323; S.Rep.No. 989, 95th Cong. 2d Sess. 81, 1977 U.S. Code Cong. & Admin.News pp. 5787, 5867, cited in Bacon 212 B.R. at 71.

ensure that goal is not thwarted by discriminatory practices which penalize someone solely because he or she availed themselves of the relief obtained through bankruptcy. But, the debtor's fresh start is not intended to be a "head start". See Bacon, 212 B.R. at 76, and Hobbs, 221 B.R. at 896. To avoid the impermissible head start, bankruptcy should not place a debtor in a better position than any other public housing tenant. Construing §525(a) to protect a debtor's right to public housing, that is, to participate in a public housing program under the terms of a lease, achieves the appropriate "fresh start" without crossing the line to a "head start". Clearly, the Debtor cannot be turned away from a government subsidized rental unit simply because she filed for bankruptcy protection or previously discharged a rent debt to a governmental landlord. But likewise, she should not be immune from eviction when she fails to pay her rent, simply because her landlord happens to be a governmental unit. For the reasons stated above, the Court finds that 11 U.S.C. §525(a) does not protect the Debtor from eviction where there is a payment default which would otherwise entitle a non-government landlord to relief from stay. Accordingly, BHA's Motion for Relief from Stay is granted to allow BHA to pursue its non-bankruptcy law remedies with respect to the Lease.

Dated: September 18, 2000

/s/ Colleen A. Brown
Colleen A. Brown
U.S. Bankruptcy Judge